Kisuli v Devki Steel Mills Ltd (Cause 33 of 2018)
[2022] KEELRC 13486 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13486 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 33 OF 2018

JK GAKERI, J

DECEMBER 8, 2022

BETWEEN

JAMES MAKAU KISULI .... CLAIMANT

AND

DEVKI STEEL MILLS LTD .... RESPONDENT

RULING

1. This is the determination of the respondent/applicant's notice of motion dated March 2, 2022 seeking the dismissal of the claimant's suit for want of prosecution.
2. The applicant urges that the suit herein was filed on January 17, 2018 and was last in court on August 13, 2019 when the suit was confirmed ready for hearing and the claimant had taken no steps to have the matter listed for hearing, rendering the suit liable for dismissal for want of prosecution under rule 16 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*, sections 3 and 12 of the *Employment and Labour Relations Court Act*, 2011 and article 159(2)(e) of the *Constitution* of Kenya, 2010.
3. The applicant served the application on June 28, 2022 and it had not been responded to by July 5, 2022.
4. After back and forth, on September 22, 2022 and October 4, 2022, the application was finally served upon the claimant's counsel.
5. The pith and substance of the respondent/applicant's notice of motion is that the suit herein has met the threshold under rule 16(3) of the *Employment and Labour Relations Court (Procedure) Rules, 2016*.

Respondent's Case

6. The claimant/respondent filed a replying affidavit dated September 26, 2022 sworn by the claimant who deposes that the application herein lacks merit and was in bad faith.

7. The claimant states that he is willing to fix the cause down for hearing and prosecute it to its logical conclusion.

8. The claimant disposes when the matter was last in court on June 25, 2009, the Deputy Registrar directed that he be re-examined by the respondent's doctor and the medical report was filed on August 13, 2019.

9. That no hearing date could be fixed thereafter because the 2020 dairy was not yet open and he was unwell in October 2019 and has been on treatment from 2020, 2021 and early 2022 and was sometimes admitted and had been on treatment since 2009 and disabled since 2013. That the Covid-19 pandemic made his position more precarious due to the restrictions.

10. That by January 2022, the previous advocate had not secured a hearing date and he changed advocates.

11. That filing of documents via the e-filing system was a challenge and his counsel visited the court's ICT office and the problem was sorted on May 13, 2022.

12. That the application herein was not in the court file by May 13, 2022.

13. That his advocate fixed the hearing date scheduled for May 26, 2022 which the registry treated as a hearing date for the application.

14. The affiant disposes that the failure to fix a hearing date was occasioned by the Covid-19 pandemic and ICT challenges.

Claimant/Applicant's Submissions

15. It is submitted that since the respondent/applicant's application was not on record on July 5, 2022 and a Notice of change of advocates had been served and an invitation to fix a hearing date and the date given as July 5, 2022, the prayers sought have been overtaken by events.

16. As regards the indolence since June 25, 2019, reference is made to the directions of the registrar on the 2nd medical report, illness, disability and Covid-19, that if 2020 and 2021 were excluded, the indolence on the part of the claimant was 11 months.

17. The court is urged to find that the reasons given were strong and convincing to explain why the claimant did not fix the matter for hearing.

18. Reliance is made on the sentiments of Visram J (as he then was) in *Agip Kenya Ltd v Highlands Tyres Ltd* [2001] KLR 630 on how the court should proceed when reason for the delay is offered.

19. Finally, it is urged that the claimant is willing and desirous to fix the suit for hearing as evidenced by the invitation from its counsel to the respondent's counsel and the date of July 5, 2022 and the efforts made to resolve the ICT challenges.

20. The court is urged to find that the claimant had demonstrated its willingness to prosecute the suit herein.

Determination

21. The only issue for determination is whether the respondent/applicant's application for dismissal of the claimant's suit is merited.

22. Rule 16 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* provide for dismissal of suits for want of prosecution.

23. Rule 16 (1) provides;

(1) In any suit in which no application has been made in accordance with rule 15 or no action has been taken by either party within one year from the date of its filing, the court may give notice in writing to the parties to show cause why the suit should not be dismissed and if no reasonable cause is shown to its satisfaction, may dismiss the suit.

(2) . . .

(3) Any party to the suit may apply for dismissal as provided in paragraph (1).

24. Needless to emphasize, the law on dismissal of a suit for want of prosecution is well settled.

25. The principles governing dismissal of suits for want of prosecution have been articulated by a case law.

26. In *Argan Wekesa Okumu v Dima College Ltd & 2 others* [2015] eKLR, the court stated as follows;

> "The principles governing applications for dismissal for want of prosecution are well settled and have been established by a long line of authorities. The applicant must show that the delay complained of is inordinate, that the inordinate delay is inexcusable and that the defendant is likely to be prejudiced by such delay. As such, the 3rd defendant in this case must meet the burden of proof in seeking the dismissal of the plaintiff's case for want of prosecution. See the case of Ivita V Kyumbu (1984) KLR 441. Further to this, the decision of whether or not to dismiss a suit is discretionary and this court must exercise such discretion judiciously. Additionally, each case must be decided on its own facts keeping in mind that a court should strive to sustain a suit where possible rather than prematurely terminating the same."

27. The principles governing the exercise of discretion were explained in *Nilesh Premchand Mulji Shah & another t/a Ketan Emporium v M D Popat and others* [2016] eKLR as follows;

> "Nonetheless, articles 159 of the *Constitution* and order 17 rule 2 (3) gives the court discretion to dismiss the suit where no action has been taken for one year and on application by a party as justice delayed without explanation is justice denied and delay defeats equity. That discretion must be exercised on the basis that it is in the interest of justice regard being had to whether the party instituting the suit has lost interest in it or whether the delay in prosecuting the suit is inordinate, unreasonable, inexcusable and is likely to cause serious prejudice to the defendant on account of the delay. This is what the case of Ivita v Kyumbu [1984] KLR 441 espoused that
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> The test applied by the courts in the application for dismissal of want of prosecution is whether the delay is prolonged and inexcusable and if it is, whether justice can be done despite the delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiffs excuse for the delay, and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter of and in the discretion of the court."

28. Applying the foregoing principles to the instant suit, it is evident that the claimant's counsel, then on record took no action to prosecute the suit after June 25, 2019 and the date for the hearing of the application dated March 2, 2022 was given by the registry.

29. Needless to rehash, the claimant relies on the Covid-19 pandemic and his indisposition as the reasons for the delay which is inordinate in the circumstances.

30. Documents on record show that the claimant/respondent was attended to at Lancet Kenya on October 15, 2019 and November 2, 2019, admitted at the Shalom hospital, Machakos for 3 days in October 2019 and for 10 days in November 2020.

31. Further documentary evidence reveal that he was attended to at the Machakos Level 5 Hospital on diverse days in July, August and September 2021.

32. Finally, the claimant was admitted at the Shalom Community Hospital for 3 days in January 2022.

33. From the foregoing, it is the finding of the court that despite the claimant's prolonged delay, the delay is excusable in light of the claimant's prolonged illness and the Covid-19 pandemic restrictions and challenges from March 2020.

34. The upshot of the foregoing finding is that the application dated March 2, 2022 is unmerited and is accordingly dismissed with no orders as to costs.

35. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 8TH DAY OF DECEMBER 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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